In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1645

GRANT C. DAVIS and WILLIAM H. DAVIS as Trustees; THE ARIZONA BANK, as Trustee; and STEWART TITLE and TRUST, as Trustee under Trusts Nos. 1094 and 1148

Petitioners,

v.

PIMA COUNTY, ARIZONA, body politic; JOSEPH CASTILLO, E. S. "BUD" WALKER, RON ASTA, SAM LENA and CONRAD JOYNER, duly elected Supervisors in and for Pima County, Arizona; GLEN KNUTSON, Pima County Zoning Inspector; TRINI GOEBEL, CYRUS COOK, GEORGE HENDY, STANLEY KRZYZANOWSKI and CHARLES CAMP, members of the Pima County Board of Adjustment No. 3,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona

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April 27, 1979

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Petitioners Grant C. Davis, as trustee, William H. Davis, as Trustee, the Arizona Bank, as Trustee, and Stewart Title and Trust, as trustee under Trusts Nos. 1094 and 1148, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Court of Appeals of the State of Arizona, filed in this proceeding on October 11,

1978, as affirmed by the Arizona Supreme Court's denial of review on January 30, 1979.

OPINION BELOW

The opinion of the Arizona Court of Appeals is reported at 590 P.2d 459 (Ariz. App. 1978) and is reprinted in full as Appendix A to this Petition. The Arizona Supreme Court's Order denying the Petitioners' Petition for Review (Appendix B, *infra*) is not reported. The trial court's findings of fact, conclusions of law and judgment (Appendix C, *infra*) are not reported.

JURISDICTION

The opinion of the Arizona Court of Appeals was entered on October 11, 1978. The Arizona Supreme Court's Order denying Review of the Court of Appeals' decision was entered on January 30, 1979. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is the Arizona Court of Appeals' ruling that money damages may never be awarded in a zoning case contrary to established Federal Constitutional law that allegations of "temporary taking" do state a claim and compel the Court to examine the facts in each case?
2. Do the Fifth and Fourteenth Amendments compel an award of damages where the lower court has found a "taking" of property for these years but declines to award compensation?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth amendments to the United States Constitution, the relevant provisions of which are set forth in Appendix D to this Petition.

STATEMENT OF CASE

In November, 1972, Respondent Pima County, following its standard practice, conditionally rezoned Petitioners' property[1] to allow development of "Camino de Manana Estates," a 285-unit subdivision which would comprise 222 mobile home lots zoned SH and 63 single-family home lots zoned CR-1. Petitioners planned to subdivide the land and install offsite improvements, *i.e.*, roads, utilities, and drainageways.

Pursuant to standard Pima County practice, the conditional rezoning resolution imposed certain conditions Petitioners had to meet and directed that, upon fulfillment of the conditions, an ordinance formally rezoning the land be presented to the Board. The conditions, which included, *inter alia*, platting the property and satisfying drainage and sanitation requirements, were set forth in the resolution itself.

After the land had been conditionally rezoned, Petitioners' civil engineering consultants began work, including preparation of the tentative plat, which is a preliminary rendering of the final plat which will subdivide the lots of record. The tentative plat also serves as the basis for governmental review of the developer's plans.

In this case, Petitioner's three tentative plats for Lots 1-285 of Camino de Manana Estates were approved by all County departments,[2] after a review process that included

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1. Petitioners hold legal title to the land as trustee for Richard Davis and other members of the Davis family. Respondents herein include not only the Pima County Board of Supervisors, which has jurisdiction to rezone property in Pima County, but Pima County itself and the Pima County Zoning Inspector, Board of Adjustment, and Planning and Zoning Commission.

2. Findings 8-12, Appendix C *infra*.

consultation over a three-year period with County departments and numerous changes at the request of various departments.

After approval of the tentative plat, the next step is preparation of a final plat. While the final plat must also be reviewed by County departments, final plat approval is normally routine, because plans already approved during the tentative plat process are merely restated, in simplified form, on the final plats.

Under A.R.S. § 11-806(c), the County Board of Supervisors' approval is required before a final plat can be recorded. In normal Pima County conditional rezoning practice, the ordinance officially rezoning the land is a perfunctory step which inevitably follows immediately upon approval of the final plat.[3] Once the ordinance has been adopted, the developer is then free to obtain building permits to initiate construction.

In this instance, Petitioners' final plats were approved by all concerned County departments and transmitted to the Respondent Pima County Board of Supervisors for approval on October 20, 1975.[4] At that time, the Board voted to delay action because of complaints of nearby property owners regarding drainage, water supply, and potential sewage problems.[5] The Board directed County staff to meet with the neighbors about their complaints.[6] After meeting with the neighbors, the consensus among the staff was that there were no significant problems with respect to water supply, sewage or drainage.[7]

3. Appendix C *infra*.
4. Findings 9-13 and Finding 17, Appendix C *infra*.
5. Finding 13, Appendix C *infra*.
6. Finding 14, Appendix C *infra*.
7. Finding 15, Appendix C *infra*.

At the next Board meeting, on November 17, 1975, Petitioners' plats again came up for consideration. The Respondent Board again asked the Planning, Highway and Sanitation Directors for any comments they might have about the adverse effects of the proposed subdivision. All officials reiterated that Petitioners had met all conditions for plat approval.[8]

Notwithstanding the staff's approval and standard Pima County practice, the Board unanimously voted to deny approval of the plats.[9] After three years' work, and some $60,000 in engineering expenses, Petitioners' project was brought to a halt. The Board gave no reason for the denial of the plats. There was no citation to any rule or regulation violated by the plats. The Board did not tell Petitioners how the unspecified defects in their plats might be cured.

On November 18, 1975 Petitioners brought a special action in the nature of mandamus in the Pima County Superior Court, Docket No. 157985, to compel approval of their plats. The complaint was served on Respondent Pima County on that date.[10]

At the next Board meeting on December 1, 1975, the Board again took up the matter of Petitioners' plats, although no notice had been given to Petitioners or their attorney and the plat denial was already in litigation. At the December 1, 1975 meeting—apparently at the urging of the Board's counsel, who cited the requirements of A.R.S. § 11-806.01—the Respondent Supervisors belatedly put their "reasons" for the denial of Petitioners' plats "on record."[11]§

8. Finding 17, Appendix C *infra*.
9. Finding 17, Appendix C *infra*.
10. Finding 18, Appendix C *infra*
11. Findings 20-21, Appendix C *infra*.

On March 2, 1976, the Superior Court ruled in Petitioners' favor in the mandamus action. The Court found that the plat denial was "arbitrary and capricious," and ordered the Board to approve the plats.

After the Camino de Manana plats were approved and recorded, pursuant to the Pima County Superior Court's Judgment in the mandamus case, Petitioners had met all the conditions of the November 21, 1972 rezoning resolution.[12] The ordinance which would have rezoned Petitioners' land was transmitted to the Board for the May 3, 1976 meeting.[13] All the requisite County Departments had approved the ordinance rezoning Petitioners' property.[14]

Under normal Pima County conditional rezoning practice, Board approval of the ordinance is a perfunctory step which inevitably follows immediately upon approval of the plat.[15] Nonetheless, the Respondent Board denied the ordinance. The denial was purportedly justified by the same reasons previously advanced to deny the plat, which the Superior Court had already found to be baseless in the mandamus action.[16]

To exhaust their administrative remedies, Petitioners then attempted to obtain the right to use their land through an alternative route. Since Petitioners' land was GR zoned and §§ 801(b) and 803 of the GR zone expressly allow single-family residential and mobile home use, Petitioners applied to the Respondent Zoning Inspector for building permits. The trial court found that the Zoning Inspector's

12. Finding 31 and Conclusion 2, Appendix C *infra*.
13. Finding 30, Appendix C *infra*.
14. Findings 27-29, Appendix C *infra*.
15. Finding 26, Appendix C *infra*.
16. See Finding 23, Appendix C *infra*.

usual practice was to issue permits for any use allowed by the GR ordinance.[17]

In this instance, the permits were denied. The Zoning Inspector stated: "We will not issue permits in Camino de Manana Estates subdivision lots 1-285, until the ordinance to change the zoning has been adopted by the Board of Supervisors."[18] The trial court found that Petitioners' case was the *only* instance in which the Zoning Inspector had refused to issue building permits in a GR zone for a use apparently permitted under the GR ordinance.[19] The Zoning Inspector's action on Petitioners' application for building permits reversed what until then had been a routine practice of approving permits under these circumstances. The denial of Petitioners' request for building permits was affirmed by Respondent Board of Adjustment No. 3.

Petitioners then filed this action in the Superior Court, requesting either (1) declaratory judgment that the existing GR zoning was invalid, together with money damages for losses caused by the Board's unlawfully denying plat and ordinance approval; or (2) a finding of inverse condemnation and an order compelling the County to purchase the property. In addition to Petitioners' state law claims, the Complaint specifically alleged that Respondents' conduct had violated Petitioners' federal rights under the Fifth and Fourteenth Amendments to the United States Constitution.[20]

After trial without a jury, the Superior Court entered findings of fact, conclusions of law, and a Judgment which invalidated the existing zoning, allowing Petitioners to use

17. Finding 47, Appendix C *infra*.
18. Finding 49, Appendix C *infra*.
19. Finding 47, Appendix C *infra*.
20. Complaint, pages 8, 12-13.

their land as if it had been rezoned as requested. The Superior Court entered extensive findings of fact and conclusions of law (Appendix C, *infra*) ruling, *inter alia,* that the Board's refusal to adopt the ordinance was arbitrary, capricious and unreasonable, and that the record was devoid of substantial, reliable, or probative evidence to support the alleged reasons for denying the ordinance. However, the Superior Court refused to award Petitioners any compensation for losses caused by Respondents' acts, even though the Court found that Petitioners suffered losses of at least $162,215 which were caused in fact by Respondents' conduct and were foreseeable by the Respondents.[21] The Superior Court's findings, conclusions and judgment made no mention of Petitioners' claim for just compensation under the United States Constitution, thus effectively denying the claim.

Petitioners appealed from the Superior Court's denial of just compensation. Respondents cross-appealed, claiming that the Superior Court erred when it found the existing GR zoning invalid.[22] Petitioners' claim of entitlement to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution was specifically argued in Petitioners' brief filed in the Court of Appeals.[23]

On October 11, 1978, the Court of Appeals issued its judgment and opinion. The Court of Appeals' opinion conceded that Respondents' acts had "taken" the property, but nonetheless refused to compensate Petitioners for damages due to delay. The Court of Appeals stated:

> "Appellants [Petitioners herein] claim they are entitled to . . . damages under either a theory of inverse eminent domain or a general tort theory. We do not agree.
>
> When a zoning ordinance is confiscatory it results in a "taking of the property" and is, in effect, the exercise of the power of eminent domain [citation omitted]. To sustain his attack on the validity of a zoning ordinance an aggrieved property owner must show that, if the ordinance is enforced, the consequent restrictions on his property would preclude use for any purpose to which it is reasonably adapted [citation omitted]. Contrary to appellees' contention the record here amply supports the trial court's conclusion on the zoning.
>
> However, though appellants established a "taking" if the Board's action were not undone, this does not mean they are entitled to money damages. In zoning matters the Board of Supervisors exercises its legislative function. If the legislative body acts wrongfully in its legislative capacity, the judicial remedy is the undoing of the wrongful legislation and not money damages."

The Court of Appeals' Opinion did not mention Petitioners' claims for just compensation and damages under the Fifth and Fourteenth Amendments to the United States Constitution. It is clear, however, that the Court of Appeals' judgment denying Petitioners any monetary relief was necessarily a denial of Petitioners' federal claims.[24]

Petitioners then moved, on November 14, 1978, for rehearing in the Court of Appeals. The Motion for Rehearing urged, *inter alia,* that the Court of Appeals' decision wrongfully denied Petitioners' federal claims based on the Fifth and Fourteenth Amendments to the United States Constitution, and further argued that the "invalidation

21. Conclusion of Law No. 17 (as amended), Appendix C, *infra.*

22. Respondents also cross-appealed from the Superior Court's award of attorneys' fees to Petitioners, an issue not material to this Petition for Certiorari.

23. Reply Brief, pages 49, 54, 55.

24. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 231-32 (1896).

only" rule adopted by the Court was unconstitutionally restrictive and contrary to federal law. The Court of Appeals denied Petitioners' Motion for Rehearing on January 3, 1979.

Petitioners petitioned the Arizona Supreme Court for review. The Arizona Supreme Court denied review on January 30, 1979. The order denying review is attached as Appendix B hereto.[25]

REASONS FOR GRANTING THE WRIT

1. The Arizona Court's Ruling That Money Damages May Never Be Awarded in a Zoning Case Is Contrary to Established Federal Constitutional Law That Allegations of "Temporary Taking" Do State a Claim and Compel the Court to Examine the Facts in Each Case.

Under Arizona law, as enunciated by the Court of Appeals in the opinion below, a landowner aggrieved by abuse of the zoning power may *never* recover money damages, either on a "just compensation" or a "constitutional tort" theory. The property owner's only remedy is invalidation of the offending regulation, no matter how great the damage, how extended the delay, or how aggravated the official conduct responsible for the loss.

Petitioners submit that whatever the Arizona law, they are entitled, on the facts of this case, to monetary relief under the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals therefore erred when it denied Petitioners' claims based on those constitutional amendments. Furthermore, to the extent Arizona law provides a narrower and more restrictive right to compensation than that provided by the United States Constitution, the Arizona rule must yield to Federal Constitutional doctrine.

25. Since the Arizona Supreme Court's jurisdiction to review the judgment of the Court of Appeals is discretionary in this instance, the Writ of Certiorari is sought to review the judgment of the Court of Appeals. *See American Railway Express Co. v. Levee*, 263 U.S. 19 (1923).

The Fifth Amendment to the United States Constitution states ". . . no person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The Fifth Amendment's proscriptions are applicable to state governmental actions via the Fourteenth Amendment, passed in 1868. *West v. Chesapeake & Potomac Tel. Co.*, 259 U.S. 662 (1935). Thus, Arizona and its subordinate bodies politic, including Respondent Pima County, are limited in their exercise of the police power by both the "due process" and "just compensation" provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

Numerous United States Supreme Court decisions support the general proposition that police power regulation may, under some circumstances, so drastically interfere with a landowner's substantive property rights as to compel compensation for the loss. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Penn Central, supra, provides the most comprehensive and most recent application of Fifth and Fourteenth Amendment principles in a municipal zoning context. Petitioners suggest that the Federal Constitutional law, as set forth in *Penn Central*, is flatly contrary to the decision of the Arizona Court of Appeals in the instant case, and requires that Petitioners recover on their Fifth and Fourteenth Amendment claims.

The Arizona law, as stated in the Court of Appeals' decision, holds that a landowner cannot recover compensation for losses that stem from wrongful zoning. By contrast, the Fifth and Fourteenth Amendments compel a detailed inquiry into the facts and circumstances of each particular case. As stated in *Goldblatt, supra,* "There is no set formula to determine where regulation ends and taking begins." 369 U.S. at 594. To the same effect is *Pennsylvania Coal, supra,* in which this Court said:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, *this is a question of degree—and therefore cannot be disposed of by general propositions.*" 260 U.S. at 416 (emphasis added).

Thus, *Penn Central* describes the judicial analysis in "taking" cases as ". . . essentially ad hoc, factual inquiries . . ." and goes on to discuss ". . . general factors that have particular significance" in determining whether a "taking" has occurred. 438 U.S. at 124.

In part two of this Petition, Petitioners will consider the instant case in light of each of the "factors" mentioned in *Penn Central* and will show that those factors bring this action within the category of cases in which a "taking" has occurred and compensation must be paid. At this juncture, however, it is important to point out the contrast between the "ad hoc, factual inquir[y]" mandated by *Penn Central* and the sweeping generality of the Court of Appeals' opinion. Petitioners suggest that where Federal law compels a case-by-case inquiry into the facts, a state cannot

constitutionally establish a blanket rule denying compensation in all cases, no matter what the facts. Petitioners were entitled to a balancing of private hardship against public interest, as set forth in *Penn Central* and its predecessors. Instead, the Court of Appeals determined that this was a "zoning" case, and ruled that invalidation was therefore the only remedy.

In the last analysis, the Court below has ruled that an allegation that zoning has effectively "taken" a landowner's property in violation of the Fifth and Fourteenth Amendments *does not state a claim*, except where invalidation of the challenged regulation is requested. The Court of Appeals' decision thus contradicts the weight of Federal authority, which holds that land use regulation which deprives an owner of all reasonable use may give rise to a claim for damages under the Fifth and Fourteenth Amendments.

At least three federal circuit courts, presented with "taking" claims arising out of various types of land use regulation, have ruled that the Fifth and Fourteenth Amendments create an independent right of action in the property owner, which can be enforced in Federal Court under the jurisdictional provisions of 42 U.S.C. §§ 1331 and 1983. The most recent is *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978), which arose out of a city ordinance establishing setback lines pursuant to a "master thoroughfare plan." A mistake in the plan led the *Gordon* Plaintiffs to begin constructing four apartment buildings within the setback area. When the Defendant Planning Commission requested that the buildings be dismantled, litigation ensued.

After three years' delay, and consequent financial damage to Plaintiffs, the Michigan Supreme Court invalidated

the zoning ordinance in question. Plaintiffs subsequently sued the City of Warren in the Federal District Court. Among the claims asserted was a theory closely paralleling Petitioners' claim in the instant action:

> "Count I as amended sought damages from the City and the commission under the 14th Amendment for the 'continuous and uninterrupted taking of property without due process of law and without just compensation during . . . a period in excess of four years.'" 579 F.2d at 387.

Defendants answered that Count I failed to state a claim because" . . . the district court had no jurisdiction to award compensation damages [sic] in an action based directly upon an alleged violation of the Fourteenth Amendment." The district court agreed, and dismissed Count I.[26]

The Court of Appeals for the Sixth Circuit reversed the district court's dismissal, concluding that "a direct cause of action does exist against municipalities to recover damages resulting from a taking of private property without just compensation." 579 F.2d at 391. This is the exact claim Petitioners have asserted in the instant case.

To the same effect is *Donohoe Const. Co. Inc. v. Montgomery Cty. Council*, 567 F.2d 603 (4th Cir. 1977). While in *Donohoe* the Fourth Circuit reversed a district court ruling that Montgomery County's pre-condemnation activity and attempted downzoning amounted to a *de facto* taking, it did not question the premise that the Fifth and Fourteenth Amendments, of themselves, provide a remedy in damages to the landowner whose property has been "taken" by regulation. Also pertinent is *Jacobson v. Tahoe Regional Planning Agency*, 558 F.2d 928 (9th Cir. 1977), which involved claims of due process violations as well as inverse condemnation; here again, the Defendant governmental agencies' motions to dismiss damage claims under the Fifth and Fourteenth Amendments for failure to state a claim were denied. *See also Barbaccia v. County of Santa Clara*, 451 F. Supp. 260 (N.D. Cal. 1978); *Hotel Coamo Springs, Inc. v. Hernandez Colon*, 426 F. Supp. 664 (D.P.R. 1976); *Sixth Camden Corp. v. Evesham Tp.* (D.N.J. 1976); *M.J. Brock & Sons v. City of Davis*, 401 F. Supp. 354 (N.D. Cal. 1975); *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974).

The foregoing cases recognize that a federal damage claim is essential to effective enforcement of the Fifth and Fourteenth Amendments. As the Court of Appeals' decision in this case demonstrates, existing state remedies do not necessarily vindicate property rights lost by unreasonable and confiscatory zoning action. *See Foster v. City of Detroit*, 405 F.2d 138, 144 (6th Cir. 1968). The federal courts have thus recognized a constitutionally grounded claim for damages "during the interim period for which the invalid restriction was in effect." *Sixth Camden Corp.*, supra at 728. Where capricious regulatory action has produced special damage, imposed extended periods of delay, and temporarily deprived the landowner of all substantive rights to his property, the federal courts have rightly recognized a monetary remedy under the Fifth and Fourteenth Amendments.

The law is clear, therefore, that Petitioners' claim that Respondents' conduct was a *de facto* "taking" of their property *does* state a claim for damages under the Fifth and Fourteenth Amendments. It was error for the Arizona Court of Appeals to rule, as it did, that "invalidation is

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26. Plaintiffs' other claims, based on 42 U.S.C. §§ 1983 and 1985, were also dismissed.

the only remedy," and thereby deny Petitioners' federal claims for compensation without reaching their merits. The Arizona Court of Appeals had a duty to consider Petitioners' federal claims on the basis of all the facts, pursuant to the applicable law as stated in *Penn Central, supra,* and its predecessor decisions.

The Arizona Court of Appeals' decision in this case, by its necessary operation, is adverse to Petitioners' Federal rights under the Fifth and Fourteenth Amendments. The Court of Appeals' ruling is clearly narrower than the federal law set forth in the cases cited above. Where federal law provides, in substance, that compensability for police power regulation depends on particular facts and that allegations of temporary taking state cognizable claims under the Fifth and Fourteenth Amendments, Arizona cannot constitutionally provide that compensation may *never* be awarded in a zoning case.

2. The Fifth and Fourteenth Amendments Compel an Award of Damages Where the Lower Court Has Found a "Taking" of Property for Three Years but Declines to Award Compensation.

As shown above, the Court of Appeals' decision is constitutionally defective because it does not *permit* a remedy in damages for zoning regulation under any circumstances. In this section, Petitioners will show that the federal constitutional law not only permits a remedy in damages, it requires just compensation to the property owner where, as here, the regulation is unsupported by any public purpose and all reasonable use has been prohibited.

Penn Central, supra, mandates a case-by-case analysis in claims of this type:

> This Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons [citation omitted]. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case. 438 U.S. at 124.

Penn Central then went on to identify several factors that are significant in determining whether a given regulation has operated as a "taking" in a particular case. The Court listed the following factors:

1. "The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . ." *Id.*

2. ". . . a use restriction on public property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . ." *Id.*

3. ". . . government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'" *Id.* at 128.

This case presents two of the three factors recognized by *Penn Central* as indicia of a taking. In the instant case, the Pima County Superior Court found that the Respondents' GR zoning, as applied to Petitioners' property, denied them any beneficial or reasonable use of the land. The reason was that the requested single-family residential and mobile home uses were the only uses allowed under the GR zone for which Petitioners' property might reasonably be used; since Respondents would not rezone the

land to allow those uses and would not issue building permits for those uses within the GR zone, there was *no* economically viable or "reasonable" use available to Petitioners.

Petitioners urge that effect on the landowner is the most crucial of all the *Penn Central* criteria. The touchstone of a "taking"—*i.e.*, whether just compensation is required—depends not upon the *gain* to the sovereign, but the *deprivation* to the landowner. *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945); see *Dugan v. Rank*, 372 U.S. 609, 625 (1963) In the instant case, Petitioners have suffered the loss of all reasonable use of their land. Notwithstanding this total deprivation, the Court of Appeals' "invalidation only" rule would deny compensation.

Not only has Respondents' conduct denied Plaintiffs every reasonable use of their land, but the record clearly shows that the challenged ordinance, as applied to Petitioners' property, had no public interest justification at all. The Superior Court found:

> 59. Although the reasons for plat and ordinance refusal were expressed by defendants [Respondents herein] in terms suggesting ". . . public health and safety . . .", those reasons were unsupported by evidence, were contradicted by the findings and conclusions of defendants' own technical staff, and were rejected by the Court in case number 157985 [the mandamus action] from which defendants took no appeal. No new or different reasons were advanced to support defendants' denial of the rezoning ordinance on May 3, 1976.

The Superior Court thus correctly concluded that there was no public purpose served by the GR zoning applied to Petitioners' land, because all the alleged reasons for denial of the requested ordinance were baseless:

> 4. The Board's refusal to adopt the ordinance bears no relationship to the promotion of public health, safety, morals or welfare.
> 5. The reasons given by the Supervisors for their refusal to adopt the ordinance are unsupported by the evidence and contrary to the express findings of the Highway, Sanitation and Planning Directors.
> 6. The record is devoid of substantial, reliable or probative evidence to support defendants' alleged reasons for refusing to approve the rezoning ordinance.
> 7. The reasons given by the Supervisors are legally insufficient to warrant rejection of the rezoning ordinance. The impropriety of the Board's refusal to adopt the ordinance is not fairly debatable.
> 8. The Board's refusal to adopt the ordinance was arbitrary, capricious and unreasonable.

The instant case presents the fact situation left unresolved in *Penn Central*. In the latter case, the regulation had not denied all reasonable use: ". . . the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return . . ." 438 U.S. at 104. Moreover, this Court found that the goal of the regulatory scheme challenged in *Penn Central*, preserving historic "landmark" buildings, served a legitimate and substantial public purpose. *See generally* 438 U.S. at 132-35. In this case, by contrast, there have been judicial determinations that (1) Respondents' conduct denied Petitioners all reasonable use of their property and (2) there was no justification in terms of public health, safety, or welfare for Respondents' refusal to approve Petitioners' plats and adopt the ordinance rezoning Petition-

ers' land. The facts of the instant case thus present the two paramount factors set out in *Penn Central:* Respondents' conduct has totally frustrated Petitioners' "distinct investment-backed expectations," and the use restrictions served no substantial public purpose.

The Court of Appeals concedes there has been a "taking" of Petitioners' property "if the [Respondent] Board's action were not undone." Petitioners suggest that while invalidation of the restrictive zoning ordinance may put an end to the taking, it does not cure the harm already inflicted by Respondents' unjustifiable regulation.

Arizona cannot constitutionally deny compensation where Davis would be entitled to recover under Federal law. If, by virtue of the Court of Appeals' ruling in this case, Petitioners must take nothing under Arizona law, they are still entitled to recover just compensation under their Federal claims—"a full and perfect equivalent for the property taken." *Monogahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Arizona Court of Appeals.

Respectfully submitted,

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Appendix A

Filed Oct 11 1978
Clerk Court of Appeals Division Two

In the Court of Appeals
State of Arizona

Division Two

2 CA-CIV 2783

Grant C. Davis and William H. Davis, as Trustees; The Arizona Bank, as Trustee; and Stewart Title and Trust, as Trustee, Under Trusts Nos. 1094 and 1148,

Appellants/Cross Appellees,

v.

Pima County, Arizona, a body politic; Joseph Castillo, E. S. "Bud" Walker, Ron Asta, Sam Lena and Conrad Joyner, duly elected Supervisors in and for Pima County, Arizona; Glen Knutson, Pima County Zoning Inspector; Trini Goebel, Cyrus Cook, George Hendy, Stanley Krzyzanowski and Charles Camp, members of the Pima County Board of Adjustment No. 3,

Appellees/Cross Appellants.

OPINION

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY
Cause No. 162419
Honorable James C. Carruth, Judge

AFFIRMED AS MODIFIED

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HOWARD, Judge.

Appellants filed a suit in the superior court alleging that the appellees wrongfully refused to rezone their property and asking for declaratory relief and damages. The trial court invalidated the existing zoning, awarded appellants attorney's fees, but refused to award them any damages.

Appellants claim the trial court erred in disallowing damages. Appellees have cross-appealed contending that the trial court erred in "rezoning" the land and awarding attorney's fees.

What is the proper judicial remedy for the undoing of wrongful legislation? That is the main issue to be decided here. We hold that appellants' sole remedy was the undoing of the legislation and not money damages.

In 1972 the Pima County Board of Supervisors approved appellants' petition to rezone their property upon appellants' compliance with certain conditions. These conditions were performed, but because of complaints from nearby property owners approval of appellants' final plats was delayed until November of 1975. At that time the board refused to approve them despite compliance with all the conditions and even though all concerned directors, department heads and its planning department were of the opinion that the neighbors' complaints were unfounded.

Appellants filed a special action in the superior court which resulted in the court ordering the board to approve the final plats submitted by appellants. No appeal was ever taken from this order. The board approved the final plats but refused to enact an ordinance rezoning the property from GR (general rural) to SH and CR-1. Appellants then applied for building permits under the existing GR zoning which they claimed permitted the construction contemplated by them. The Pima County Zoning Inspector refused to issue permits until the zoning was changed. Appellants then filed this lawsuit. The court made extensive findings of fact. It found that appellants' contemplated use, to-wit, single family residential and mobile home use, is the only use allowable under GR zoning for which the subject property may reasonably be used; that the board's action was arbitrary and capricious and bore no relation to public health, safety and welfare; and that the issue of the rezoning was not fairly debatable. It did not, however, find that the board of supervisors acted in bad faith and specifically rejected appellants' conclusion of law on that issue.

Appellants claim damages in the sum of $67,035 for loss in the property value because of the delay in securing their right to build on the property and the sum of $95,180 for the loss of an aid-in-construction agreement which would have been available had the board changed the zoning after the entry of the order in the special action. Appellants claim they are entitled to these damages under either a theory of inverse eminent domain or a general tort theory. We do not agree.

When a zoning ordinance is confiscatory it results in a "taking of the property" and is, in effect, the exercise of the power of eminent domain. Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); Gold Run,

Ltd. v. Board of County Commissioners, 554 P.2d 317 (Colo.App. 1976). To sustain his attack on the validity of a zoning ordinance an aggrieved property owner must show that, if the ordinance is enforced, the consequent restrictions on his property would preclude use for any purpose to which it is reasonably adapted. City of Phoenix v. Oglesby, 112 Ariz. 64, 537 P.2d 934 (1975). Contrary to appellees' contention the record here amply supports the trial court's conclusion on the zoning.

However, though appellants established a "taking" if the board's action were not undone, this does not mean they are entitled to money damages. In zoning matters the board of supervisors exercises its legislative function. If the legislative body acts wrongfully in its legislative capacity the judicial remedy is the undoing of the wrongful legislation and not money damages. HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal.3d 508, 542 P.2d 237 (1975). The proper remedy when zoning is confiscatory is either to seek by declaratory judgment to invalidate the general zoning ordinance or to challenge the particular rezoning determination by means of a special action. Gold Run, Ltd. v. Board of County Commissioners, supra.

The trial court erred when it was awarded $25,000 attorney's fees to appellants. If appellants are to recover for attorney's fees it can only be by virtue of A.R.S. Sec. 12-341.01(A) which states:

> "In any contested action arising out of a contract, express or implied, the court may award the succesful party reasonable attorney's fees."

The trial court in its conclusions of law stated that the "conditional" rezoning created an implied contract. This theory is incorrect. The board of supervisors did not and cannot, expressly or impliedly, bargain away its legislative

zoning powers. Andgar Associates, Inc. v. Board of Zoning Appeals, 30 App.Div.2d 672, 291 N.Y.S.2d 991 (1968). The power to regulate land use through zoning ordinances is vested in municipal legislatures and they cannot bargain away this power. R. Anderson, 2 American Law of Zoning Sec. 9.21 (2nd ed. 1968).

That part of the judgment awarding appellants attorney's fees is vacated and set aside and the judgment is affirmed as modified.

s/ .....
LAWRENCE HOWARD, Judge.

CONCURRING:

/s .....
JAMES D. HATHAWAY, Judge.

/s .....
JAMES L. RICHMOND, Chief Judge.

Appendix B

Clifford H. Ward
Clerk

Mary Ann Hopkins
Chief Deputy Clerk

SUPREME COURT
State of Arizona
201 South-West Wing
Capitol Building
Phoenix 85007

January 31, 1979

Supreme Court
No. 14147-PR

Court of Appeals
No. 2 CA-CIV 2783

Pima County
No. 16249

Grant C. Davis and William H. Davis, as Trustees; the Arizona Bank, as Trustee; and Stewart Title and Trust, as Trustee, under Trusts Nos. 1094 and 1148.

Appellants/Cross Appellees,

vs.

Pima County, Arizona, a body politic; Joseph Castillo, E. S. "Bud" Walker, Ron Asta, Sam Lena and Conrad Joyner, duly elected Supervisors in and for Pima County, Arizona; Glen Knutson, Pima County Zoning Inspector; Trini Goebel, Cyrus Cook, George Henry, Stanley Krzyzanowski and Charles Camp, members of the Pima county Board of Adjustment No. 3,

Appellees/Cross Appellants.

The following action was taken by the Supreme Court of the State of Arizona January 30, 1979 in regard to the above-entitled cause:

"ORDERED: Petition for Review=DENIED."

Chief Justice James Duke Cameron voted to grant.

Record returned to the Court of Appeals, Division Two, Tucson, this 31st day of January, 1979.

CLIFFORD H. WARD, *Clerk*
By Pat Goeller
Deputy Clerk

GRANT C. DAVIS et al v. PIMA COUNTY et al
Supreme Court No. 14147-PR
Court of Appeals No. 2 CA-CIV 2783
Pima County No. 162419
January 31, 1979
Page Two

TO: S. L. Schorr, Esq., John F. Battaile III, Esq., Schorr, Leonard & Felker, 155 West Council Street, Post Office Box 191, Tucson, Arizona 85702
Stephen D. Neely, Pima County Attorney, 111 West Congress Street, 9th Floor, Tucson, Arizona 85701
Hon. James C. Carruth, Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701
Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

Appendix C

Filed Sep 29 10:00 AM '77
Norma H. Felix, Clerk Superior Court
By .....
Deputy

Law Offices
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155 West Council Street
P.O. Box 191
Tucson, Arizona 85702
(602) 622-7733
S. L. Schorr
John F. Battaile III
Attorneys for Plaintiffs

In the Superior Court of the State of Arizona
in and for the County of Pima

No. 162419

Grant C. Davis and William H. Davis, as Trustees; the Arizona Bank, as Trustee; and Stewart Title and Trust, as Trustee under Trusts Nos. 1094 and 1148.

Plaintiffs,

v.

Pima County, Arizona, a body politic; Joseph Castillo, E. S. "Bud" Walker, Ron Asta, Sam Lena and Conrad Joyner, duly elected Supervisors in and for Pima County, Arizona; Glen Knutson, Pima County Zoning Inspector; Trini Goebel, Cyrus Cook, George Henry, Stanley Krzyzanowski and Charles Camp, members of the Pima County Board of Adjustment No. 3,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for trial on June 21, 1977, before the Honorable James C. Carruth, sitting without a jury. Plaintiffs were represented by Schorr & Leonard, P. C. by S. L. Schorr and John F. Battaile III, and defendants were represented by the Pima County Attorney, by Deputy County Attorney Albin Krietz. Having heard evidence and considered argument of counsel, and taken the matter under advisement, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiffs, Grant C. Davis and William H. Davis, are residents of Pima County, Arizona, and the plaintiffs, the Arizona Bank and Stewart Title and Trust, as Trustees, are Arizona corporations doing business in Pima County, Arizona, and the owners of Lots 1-285 of Camino de Manana Estates, real property legally described as:

> Lots 1 through 285, Camino de Manana Estates, a subdivision of Pima County, Arizona recorded in Book 27 at pages 77, 78 and 79

which property is hereinafter referred to as "subject property."

2. Defendant, Pima County, Arizona (hereinafter referred to as "County"), is now, and at all material times herein mentioned was, a body politic, organized and existing under and by virtue of the laws of the State of Arizona; defendants Joseph Castillo, E. S. "Bud" Walker, Ron Asta, Sam Lena and Conrad Joyner (hereinafter referred to as "Supervisors" or "Board"), are and were at all material times herein mentioned, duly elected members of the Board of Supervisors of Pima County, Arizona, and/or successors

to the preceding duly elected Board of Supervisors of Pima County, Arizona. Katie Dusenberry and David Yetman are duly elected successors to Joseph Castillo and Ron Asta, respectively.

3. The Supervisors are charged with the duty, among others, of enacting ordinances dividing the County and portions thereof into zoning districts according to the locations of uses of private real property deemed best to preserve and promote public health, safety, morals and general welfare.

4. The defendant, Glen Knutson (hereinafter referred to as "Zoning Inspector") is the Pima County Zoning Inspector. The defendants Trini Goebel, Cyrus Cook, George Henry, Stanley Krzyzanowski and Charles Camp (hereinafter referred to as "Board of Adjustment") were the duly appointed and acting members of the Pima County Board of Adjustment No. 3 at all material times herein.

5. The Zoning Inspector is charged with the duty, among others, of processing and issuing building permits; the Board of Adjustment is charged with the duty, among others, of hearing and deciding appeals where it is alleged that the Zoning Inspector had erred in his duties under applicable County Zoning ordinances.

6. On November 21, 1972, the Supervisors unanimously accepted the recommendation of the Pima County Planning and Zoning Commission (Planning Commission), and voted to approve plaintiffs' Petition Co 9-72-51 to rezone the subject property from GR to SH and CR-1. The approving resolution ordered that an ordinance be drawn for presentation to the Supervisors upon plaintiffs' compliance with the following conditions:

"(1) Satisfaction of the County Engineer's draining requirements;

(2) Recording a covenant to the effect that the SH lots will not be split into lots less than 36,000 square feet;
(3) Recording an acceptable plat that will provide for necessary rights of way for roads and drainage;
(4) Completion of the requirements for a zoning ordinance within three (3) years from the date of approval by the Board of Supervisors;
(5) A suitable arrangement with the Pima County Department of Sanitation regarding sanitary facilities;
(6) Recording a covenant holding Pima County harmless in the event of flooding; and
(7) Planting buffers on the east and west sides of the subject property."

On November 3, 1975, the Board voted to grant an extension of two months, until January 21, 1976, as the time within which the plaintiffs had to meet the conditions of the rezoning action of the Supervisors on November 21, 1972.

7. In accordance with requirement No. 3 of the Supervisors' resolution of November 21, 1972, plaintiffs, in May, 1975, submitted three plats for the subdivision of the subject property: one for Camino de Manana Estates, Lots 1-86, one for Camino de Manana Estates, Lots 87-222, and one for Camino de Manana Estates, Lots 223-285.

8. Platting procedures in Pima County are governed by Article 33, County Zoning Plan, entitled Subdivision Standards, Procedures and Requirements. Under Article 33, the Pima County Planning Commission transmits copies of tentative plats to the County Engineer (Highway Department), County Sanitation Department and affected utility companies. These officials review the plat and report their recommendations to the Planning Director. The Planning Director submits the recommendations of the afore-

named officials, together with his recommendations to the Commission and to the Board.

9. By letter of January 10, 1975 to plaintiffs' engineers, the Department of Sanitation advised plaintiffs they approved of the percolation and boring results for Camino de Manana Estates.

10. On August 18, 1975, the Department of Sanitation acknowledged receipt of the revised final plats and stated they ". . . approve and recommend transmittal to the Board of Supervisors for their review and comment."

11. By letter dated October 15, 1975, the Director of the Highway Department informed the Planning Director that the final plats had been reviewed for drainage requirements and other related aspects and found to ". . . be generally satisfactory. Therefore, the revised final plat for the subject subdivision is hereby approved."

12. By letters dated October 15, 1975, the Planning Director transmitted prints of the final plats, stating that they had been checked and found to conform with the requirements of Article 33 of the County Zoning Plan, and the conditions of approval of the tentative plat, and recommended Board approval of the plats.

13. On October 20, 1975, a hearing on final plats for the subject property was held before the Supervisors. At that time, the Supervisors voted to delay action because nearby property owners had complained that the proposed subdivision would generate drainage problems on their property, cause undue strain on the area's water supply and produce sewage problems to their property.

14. At the October 20, 1975 hearing, the Supervisors directed the Planning Staff, and other County officials, to meet with plaintiffs and the neighboring property owners concerning their complaints.

15. On October 21, 1975, a meeting was held at the Planning Commission conference room to discuss the problems which had been raised by the neighbors concerning the platting for the subject property. At the meeting, which was attended by representatives of the Metropolitan Utilities Management Agency (MUM), the County Department of Sanitation, the County Planning Commission and the County Health Department, representatives of plaintiffs and many of the protesting neighboring property owners, complaints concerning drainage and other related matters were discussed and answered. The consensus by the County staff was that there was no need for the Supervisors to have a further study session on the final plats, as it was the staff's conclusion that there were no significant problems with respect to the planned ultimate domestic water supply, the sewage disposal system or drainage.

16. On October 30, 1975, the County Sanitation Department notified the County Planning Department that:

> "In conclusion, our department feels that an acceptable arrangement has been met for this project and cannot distinguish any unanswered questions which should be responded to prior to recordation of this plat."

17. On November 17, 1975, the matter of approval of plaintiffs' plats came on for public hearing before the Supervisors, who again asked the Director of the Planning Department, Mr. Alex Garcia; the Director of the Highway Department, Mr. Jerry Jones; and the Director of the Sanitation Department, Mr. E. W. Dooley, for any comments they might have concerning the adverse effects of the platting. All officials reiterated their statement that all of the conditions necessary for plat approval had been met. Notwithstanding that advice, the Supervisors unanimously voted to deny approval of the plats.

18. On November 18, 1975, plaintiffs instituted a special action in the Superior Court of Pima County, Arizona, entitled "The Arizona Bank, as Trustee, et al. v. Pima County, a body politic, et al.," Docket No. 157985.

19. The complaint in Action No. 157985 was served upon defendant Pima County on November 18, 1975.

20. On December 1, 1975, at the Board's regularly scheduled meeting, the Supervisors again took up the matter of plaintiffs' plats. At the December 1, 1975 meeting, pursuant to advice of counsel, the Supervisors purported to amend the Board's record to state their reasons for denying approval of plaintiffs' plats at the December 17, 1975 meeting. Neither plaintiffs nor their counsel were given any notice that the Board would take further action on plaintiffs' plats at the December 1, 1975 meeting.

21. The reasons given at the December 1, 1975 Board meeting for denial of plaintiffs' plats at the November 17, 1975 meeting were stated in the clerk's official minutes of the December 1, 1975 meeting (prepared on December 4, 1975) as:

"(1) Flooding problems. The area is subject to tremendous sheet flow, which was demonstrated by the adjacent established homeowners already living in the area protesting the development;

(2) Possible pollution of ground water supplies from the septic tank fields from Camino de Manana development as proposed;

(3) Access to the proposed Subdivision is across an unguarded railroad track;

(4) The Planning Director, under questioning from the Board, had referred to the plat as 'marginal';

(5) No specific solution to the flooding problems has been presented to the Highway Department Director nor does he himself have a solution at this time; and

(6) Pima County will be liable for the maintenance of the flood area."

22. On January 9, 1976, the Superior Court found for defendants in Action No. 157985. The Conditional Rezoning would expire on January 21, 1976. Plaintiffs filed a special action in the Court of Appeals, Division Two. On January 20, the Court of Appeals ordered, based on stipulation of counsel for the County and the Supervisors, that it be stipulated in Action No. 157985 to enjoin the expiration of the Conditional Rezoning pending determination of plaintiffs' motion for new trial and any appeal. On January 31, 1976, the parties to Action No. 157985 stipulated accordingly.

23. On March 2, 1976, the Superior Court granted plaintiffs' motion and entered Findings of Fact, Conclusions of Law and Judgment in Superior Court Action No. 157985 in favor of plaintiffs herein. That document included, *inter alia*:

"Findings of Fact

6. The record of the Board hearing held November 17, 1975, is devoid of substantial, reliable or probative evidence to support defendants' alleged reasons for refusing to approve plaintiffs' plats.

17. Following the meeting with the neighboring protesting property owners, at which each of the affected Pima County departments was represented, the Planning Director reported to the Board on November 17, 1975 that:

'As far as we can determine . . . we can detect no problem being generated by the subdivision itself. We had representatives there from not only Sanitation, but also the Health Department, and as a consequence there was nothing adverse to report to the Board from that standpoint.'

The head of the County Highway Department said:

> '. . . There is no ill effect or damage will be done to the existing property owners because of the sheet flow because the drainage has been designed to handle the sheet flow within the subdivision.'

19. Subsequent to and in reasonable reliance in good faith upon the Board's conditionally rezoning the subject property on November 2, 1972, and further relying upon the actions of the Board's authorized agents in reviewing, changing and approving plaintiffs' tentative and final plats, plaintiffs changed their position to their detriment, including but not limited to investing over $55,000.00 for engineering and other professional services in connection with preparation and lateration of the subject plats."

"Conclusions of Law

1. The provisions of Article 33 of the County Zoning Plan, entitled 'Subdivision Standards, Procedures and Requirements' are the applicable procedures required to be followed for all platting of Pima County property.

2. The plaintiffs have in all respects complied with the provisions of said Article 33 in the three final plats submitted for the development of the subject property.

5. The alleged reasons given by the Board for refusing to approve the three plats submitted for the subject property on November 17, 1975, were at variance with the statements of the Pima County Planning Director, Sanitation Director and Director of the Highway Department, and were legally insufficient to warrant rejection of the plats.

6. Said record is devoid of substantial, reliable, or probative evidence to support defendants' alleged reasons for refusing to approve plaintiffs' plat.

7. By reason of the actions of the defendants in relation to the subject plats, the plaintiffs have standing to bring this special action.

10. By reason of the defendant Board's conditional rezoning of the subject property and the subsequent acts of its authorized agents in subordinate Pima County Departments, including but not limited to reviewing, recommending changes in, and approving plaintiffs' tentative and final plats, and plaintiffs' reasonable reliance thereon and subsequent change of position, defendant Board is estopped to refuse approval of plaintiffs' plats.

11. The Board's position vested rights in plaintiffs to approval of their plats, which rights may not be defeated by the defendant Board's refusal to process the subject plats."

"Judgment

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that:

1. Each of the defendants, in violation of their duties and the requirements of the Pima County Zoning Plan and the Arizona Revised Statutes made and provided for in such cases, have unlawfully refused and neglected to approve the three plats submitted for the development of Camino de Manana Estates Lots 1-285.

2. Defendants, and each of them, by their actions as aforesaid, have arbitrarily and unjustly failed to perform an act which the law specifically imposes as a duty resulting from an office, trust or station; failed to exercise discretion which they had a duty to exercise; failed to exercise or to perform a duty required by law as to which they have no discretion; proceeded or are proceeding or threatening to proceed without or in excess of jurisdictional or legal authority, and/or made a determination which was arbitrary and capricious or an abuse of discretion.

3. The defendants and their agents, servants and employees are directed to forthwith approve the three plats submitted for Camino de Manana Estates Lots 1-285.

4. The plaintiffs are entitled to their costs and disbursements herein expended.

5. The plaintiffs may apply to this Court for any further relief necessary to carry out the provisions of this Judgment as justice may require."

24. The time for appeal has elapsed and no appeal has been filed in said Action No. 157985.

25. Notwithstanding the terms of the Judgment and the plaintiffs' request by letter dated March 3, 1976, that the Supervisors approve the plat at their next meeting, the Supervisors refused to act until April 5, 1976, when the Supervisors approved the final plats.

26. Under normal County practice in conditional rezonings, Board approval of the ordinance is a perfunctory step which inevitably follows immediately upon approval of the plat.

27. The Planning Department was notified by letters of April 13, 1976, and April 22, 1976, on the letterhead of MUM, that all of the Pima County Sanitation Department's requirements had been met and that the Sanitation Department recommended ordinance transmittal.

28. By letter dated April 14, 1976, the County Planning Department notified plaintiffs' civil engineering consultants:

"As of yesterday, April 13, 1976, Property Management's requirements for project approval have been satisfied and they have no objection to the transmittal of an ordinance."

29. After final plat approval, there is no further review taken by either the Property Management or Highway Departments prior to ordinance approval, except to assure that all conditions are met.

30. The ordinance for rezoning the subject property to SH and CR-1 was transmitted to the Board on May 3, 1976.

31. Each and every condition of the November 21, 1972 conditional rezoning resolution has been met:

(1) The County Engineer has approved the drainage requirements.

(2) The recorded final plat contains a notation that the SH lots will not split into lots of less than 36,000 square feet.

(3) The plats were recorded April 5, 1976, in the office of the Pima County Recorder.

(4) The requirements were completed within the required time, as extended by the Board and as per stipulation and order of January 31, 1976, in Action No. 157985.

(5) The Department of Sanitation approved the project.

(6) A covenant holding Pima County harmless in the event of flooding was placed on the recorded final plat.

(7) The recorded final plats contain a covenant for planting buffers, a condition subsequent to approval.

32. Having fully complied with the conditions of the conditional rezoning approval by the Supervisors on November 21, 1972, plaintiffs requested by letter dated April 13, 1976, that an ordinance be acted upon by the Supervisors at their next meeting rezoning the subject property from GR to SH and CR-1. The Supervisors refused to take action until May 3, 1976, when they denied passage of

Ordinance No. 1976-41, which would have rezoned the property from GR to SH and CR-1.

33. In order to build upon 22 of the Camino de Manana lots, it was necessary for plaintiffs to acquire a right of way for drainage purposes across a small parcel of land from the State Land Department, and then deed it to the County. In accordance with custom and agreement with plaintiffs, the Department of Property Management agreed to acquire the right of way, with plaintiffs to pay the cost of acquisition of the land from the State.

34. The proposed acquisition of a right of way for drainage purposes was the subject of a protest by Tucson Gas and Electric and Southern Pacific Railroad. The TG&E protest was withdrawn in April, 1976.

35. On May 5, 1976, subsequent to ordinance disapproval, the Director of the Property Management Department wrote to the County Manager that Southern Pacific Railroad's protest to the acquisition of the right of way, and possible failure of the State Land Department to transfer the land, "would be another valid reason to delay the captioned matter (*i.e.*, ordinance adoption)."

36. The reason the State land had to be acquired was because Lots 87 through 108 of Camino de Manana would be adversely affective by runoff unless the State land parcel was acquired to provide drainage.

37. Plaintiffs agreed with the County Department of Property Management Department that no building would be done on Lots 87-108 until the drainageway had been acquired by the County from the State and been constructed. Said agreement was embodied in a note placed on the final plats.

38. Acquisition of the State land parcel was not a condition of approval of the ordinance rezoning plaintiffs' land to SH and CR-1.

39. The Southern Pacific protest over sale of drainageway rights over State land was not considered by the Board in denying the ordinance on May 3, 1976.

40. Southern Pacific Railroad withdrew its protest on August 23, 1976.

41. At the trial of this action on June 21, 1977, defendants attempted to show that State Land Department approval had not been obtained, and therefore that plaintiffs had not met the requirements for ordinance adoption.

42. Not until May 4 or May 5, 1976, *after* the May 3, 1976 ordinance denial, did Property Management recommend no transmittal of ordinance for lack of the drainageway.

43. On June 9, 1977 (before the trial of this action on June 21, 1977) the County had received approval from the State Land Department. A copy of this approval was voluntarily furnished to plaintiffs after trial by Deputy County Attorney Albin Krietz.

44. After the ordinance was denied, plaintiffs applied to the Zoning Inspector for building permits under the existing GR zone applicable to the subject property.

45. Pursuant to §§ 8.01(b) and 8.03 of the GR zone, single family residence and mobile home use is permitted, provided a minimum lot area of 36,000 square feet is maintained.

46. Subject property is presently zoned GR and contains recorded lots, all of which are in excess of 36,000 square feet.

47. The usual practice of the Zoning Inspector is to issue permits for any use allowed under the GR zone. Except for this instance, he has never refused to issue building permits in a GR zone for a use seemingly permitted under the GR ordinance.

48. The then Deputy County Attorney, Howard Watt, instructed the Zoning Inspector to deny building permits for plaintiffs' property.

49. By letter of June 4, 1976, the Zoning Inspector notified plaintiffs that he would not issue building permits in Camino de Manana Estates for residences on Lots 1-285, until an ordinance to change the zoning from GR has been adopted by the Supervisors.

50. An appeal of the Zoning Inspector's refusal to issue building permits was taken to the Board of Adjustment, District #3.

51. A memorandum of July 22, 1976, from Executive Secretary Ronald Greene, an employee of the County Planning Department, to Board of Adjustment No. 3 regarding plaintiffs' appeal failed to advise the Board of the Zoning Inspector's general rule of issuing building permits for uses permitted under GR zone. On the contrary, Greene advised the Board that "Building permits may not be issued by the Zoning Inspector's office until after this rezoning ordinance is adopted by the Board of Supervisors."

52. On July 22, 1976, the Board of Adjustment denied plaintiffs' appeal from the Zoning Inspector's refusal to issue building permits for subject property. Said denial was officially entered on the minutes of the Board of Adjustment on said date.

53. Single-family residential and mobile home uses are the only uses allowable under the GR zone for which the subject property may reasonably be used.

54. By letter of intent dated October 22, 1975, plaintiffs entered into a preliminary aid-in-construction agreement under which plaintiffs agreed to install the water system for Camino de Manana Estates, deed the system to MUM, and plaintiffs' cost of installation would be refunded from

30% of the water revenue received from the subdivision until the cost of the water system had been refunded, or until 20 years had elapsed, whichever came first.

55. Plaintiffs' projected capital investment for the water system to the subject property would have cost approximately $200,000.00.

56. On June 23, 1976, MUM notified plaintiffs that their preliminary aid-in-construction agreement had been preempted by Ordinance No. 4489 effective June 23, 1976, and therefore plaintiffs would not be entitled to any refund of any part of the capital cost of construction of an internal water facility to serve the subject property.

57. At the time the plats were disapproved, the defendant Board members were aware that approval of final plats, if all departmental approvals had been given, are ministerial acts on their part.

58. The Board was aware that there is a history and custom in Pima County that once a subdivision plat has been approved and the conditions are met, ordinance approval becomes automatic.

59. Although the reasons for plat and ordinance refusal were expressed by defendants in terms suggesting ". . . public health and safety . . .", those reasons were unsupported by evidence, were contradicted by the findings and conclusions of defendants' own technical staff, and were rejected by the Court in case number 157985, from which defendants took no appeal. No new or different reasons were advanced to support defendants' denial of the rezoning ordinance on May 3, 1976.

60. By the time of trial in Action No. 157985, plaintiffs had expended $55,000 on preliminary engineering and other work in order to develop an acceptable final plat. By the

time of trial in this action, plaintiffs had expended $62,329.56 for engineering services related to the subject property.

61. The amounts referred to in paragraph 60 above were expended by plaintiffs in good faith reliance upon the conditional rezoning resolution of November 21, 1972, and would not have been expended in the absence of such conditional rezoning resolution.

62. Plaintiffs have been forced to expend various sums for legal fees from November 1, 1975 to date, in Superior Court Docket No. 157985; Court of Appeals Docket No. 2 CA CIV 2089; Board of Adjustment proceedings, and in these proceedings, totaling $32,463.59.

63. If defendants had followed normal practice and proceeded according to law by approving plaintiffs' plats on November 17, 1975 and approving the ordinance immediately thereafter, plaintiffs would have begun construction of improvements to the subject land no later than January 1, 1976, and would have begun selling lots no later than April 1, 1976.

64. Plaintiffs' property consists of 285 platted, subdivided lots ready for offsite improvements and marketing.

65. By delaying the approval of plaintiffs' development project until at least July 1, 1977, defendants have proximately caused a loss in present value of plaintiffs' property by $67,035.

66. If the ordinance had been approved on May 3, 1976, plaintiffs would have qualified for and obtained the benefit of the aid-in-construction agreement with MUM.

67. The present value of the lost MUM aid-in-construction contract, had plaintiffs been then able to acquire it and had defendants not wrongfully refused to adopt the ordinance rezoning the subject property, would be $95,180.

68. During the period development was delayed from January 1, 1976 to July 1, 1977, plaintiffs expended $31,192 for interest, incidental expenses and taxes to carry the property.

69. The actual economic damage to plaintiffs caused by carrying the subject property from January 1, 1976 to July 1, 1977, is $131,371, which loss flows from the loss of use of plaintiffs' funds immobilized in the subject property.

70. Plaintiffs had a known or reasonably foreseeable business expectancy of contracting for development of Camino de Manana subdivision, for subsequent sale for profit of subdivided lots, and for consummation of the aid-in-construction contract with MUM.

71. Defendants knew or reasonably should have known that arbitrary and capricious delay of plaintiffs' project could cause them damages, increase the price of building materials, the cost of labor, the interest rate on borrowed money, and many other specific areas of harm.

72. The Court adopts as facts those matters contained in the two stipulated orders dated August 18, 1977 and filed in court on August 19, 1977.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. Plaintiffs have fully complied with the conditions for ordinance adoption embodied in the conditional rezoning resolution of November 21, 1972.

a. The acquisition of a parcel of land from the State Land Department for drainageway purposes was not a condition to the adoption of the ordinance rezoning plaintiffs' land to SH and CR-1.

b. The inclusion of note number 17 on the final plats, prohibiting sale of Lots 87-108 until drainage-

ways had been provided for, vitiated any claim that the ordinance could be disapproved for insufficient drainage.

3. Defendants are collaterally estopped in this action to contend that there exists any reason for denial of the requested ordinance based on drainage, sanitation, or access, inasmuch as those issues were litigated, determined and not appealed from in case number 157985.

4. The Board's refusal to adopt the ordinance bears no relationship to the promotion of public health, safety, morals or welfare.

5. The reasons given by the Supervisors for their refusal to adopt the ordinance are unsupported by the evidence and contrary to the express findings of the Highway, Sanitation and Planning Directors.

6. The record is devoid of substantial, reliable or probative evidence to support defendants' alleged reasons for refusing to approve the rezoning ordinance.

7. The reasons given by the Supervisors are legally insufficient to warrant rejection of the rezoning ordinance. The impropriety of the Board's refusal to adopt the ordinance is not fairly debatable.

8. The Board's refusal to adopt the ordinance was arbitrary, capricious and unreasonable.

9. The conditions for rezoning set forth on November 21, 1972, were placed on the subject property at the instance of the County Planning and Zoning Commission.

10. In good faith reliance on the Board's conditional rezoning, plaintiffs invested over $55,000, expended time and effort in preparation of development, arranged for construction and for provisions of water, incurred other obligations and otherwise materially and substantially changed their position.

11. It was foreseeable that plaintiffs would rely on the Board's action in the conditional rezoning, and plaintiffs have so relied, to their detriment.

12. There is no good cause, no substantial change in circumstances, nor any adversity to the welfare of the citizenry to warrant a denial of the rights acquired by plaintiffs as a result of the conditional rezoning.

13. It would be highly unjust and inequitable to destroy the rights which plaintiffs have acquired as a result of the conditional rezoning.

14. The Board of Supervisors is estopped to deny requested change in ordinance adoption to SH and CR-1.

15. Plaintiffs, having complied with all the conditions delineated to the conditional rezoning, possess a vested right to use their land as if it had been rezoned to SH and CR-1.

16. Prior to the filing of this action, plaintiffs undertook to exhaust, and did exhaust, every administrative remedy available to them.

17. Defendants' refusal to grant the rezoning, and to issue building permits, has caused plaintiffs consequential damages of at least $162,215, from November 1975 to date. Although plaintiffs have clearly suffered these losses as a direct result of defendants' conduct, the Court is not persuaded that plaintiffs have shown themselves to be entitled to an award of damages to compensate for such losses.

18. Plaintiffs have incurred attorneys' fees directly related to defendants' wrongful refusal to rezone or issue building permits, from November 1975 to date, in excess of $32,000.

19. The conditional rezoning granted by defendants on November 21, 1972 created an implied contract within the meaning of Section 12-341.01, Arizona Revised Stat-

utes, as amended, and plaintiffs have proven themselves "just claimants" within the meaning of that statute.

20. Plaintiffs are entitled to an award of reasonable attorneys' fees to mitigate the burden of this litigation, in the amount of $25,000.

Dated this 26th day of September, 1977.

James C. Carruth
The Honorable James C. Carruth
Judge of the Superior Court

Filed Nov 28 3:04 PM '77
Norma M Felix, Clerk Superior Court

In the Superior Court of the State of Arizona
in and for the County of Pima

No. 162419

DATE November 28, 1977

JAMES C. CARRUTH
Judge/Court Commissioner

GRANT C. DAVIS, et al,
Plaintiff

PIMA COUNTY, ARIZONA, a body politic, et al.
Defendant

Minute Entry

Motion to Amend Findings and Conclusions — UNDER ADVISEMENT

Having considered the matters,

IT IS ORDERED that the conclusion of law No. 17 is amended to read as follows:

Defendants' refusal to grant the rezoning, and to issue building permits, has caused plaintiffs consequential damages of at least $162,215, from November 1975 to date. Such damages were caused, in fact, by defendants' conduct and were foreseeable by defendants. Nevertheless, the Court

concludes as a matter of law that the plaintiffs are not entitled to compensation for those damages.

CC Court Admin.
Judge Carruth
Clerk V
Schorr and Leonard
County Attorney (Civil Division—Mr. Krietz)
UNDER ADVISEMENT CLERK

NORMA M. FELIX, Clerk
By Maxine Mowrer
Deputy

Filed 46 Sep 29 10:06 AM '77
Norma M. Felix Clerk Superior Court
By .....
Deputy

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(602) 622-7733
S. L. Schorr
John F. Battaile III
Attorneys for Plaintiffs

In the Superior Court of the State of Arizona
in and for the County of Pima

No. 162419

Grant C. Davis and William H. Davis, as Trustee; the Arizonia Bank, as Trustee; and Stewart Title and Trust, as Trustee, under Trusts Nos. 1094 and 1148,

Plaintiffs,

v.

Pima County, Arizona, a body politic; Joseph Castillo, E. S. "Bud" Walker, Ron Asta, Sam Lena and Conrad Joyner, duly elected Supervisors in and for Pima County, Arizona; Glen Knutson, Pima County Zoning Inspector; Trini Goebel, Cyrus Cook, George Hendy, Stanley Krzyzanowski and Charles Camp, members of the Pima County Board of Adjustment No. 3,

Defendants.

JUDGMENT

This action came on regularly for trial before the Court, Honorable James C. Carruth, sitting without a jury, on June 21, 1977. S. L. Schorr and John F. Battaile III of Schorr & Leonard, P.C. appeared as attorneys for the plaintiffs. Albin Krietz, Deputy County Attorney, appeared for the defendants.

Each of the parties having presented testimony and other evidence; each of the parties having presented Memoranda and Proposed Findings of Fact and Conclusions of Law to the Court; the Court having taken the matter under advisement, heard oral argument and considered said Memoranda and Proposed Findings of Facts and Conclusions.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants' present zoning ordinance and practice as applied to Lots 1-285, Camino de Manana Estates, a subdivision of Pima County, Arizona, recorded in Book 27 of Maps at 77, 78, and 79, are unconstitutional, illegal, and void.

2. Plaintiffs have a clear legal right to develop and use Lots 1-285, Camino de Manana Estates, a subdivision of Pima County, Arizona, recorded in Book 27 of Maps at 77, 78, and 79, pursuant to the provisions of Articles 7 and 9, Pima County Zoning Plan, as though an ordinance had been adopted rezoning the property to SH and CR-1. Plaintiffs have a clear legal right to receive building and all other permits necessary to develop and beneficially use the subject property in accordance with Articles 7 and 9, County Zoning Plan.

3. Plaintiffs have judgment against defendant Pima County, Arizona, in the amount of Twenty-Five Thousand Dollars ($25,000.00) for reasonable attorneys' fees.

4. Plaintiffs may apply to this Court for such other and further relief as may become necessary to carry out the provisions of this Judgment.

DONE IN OPEN COURT this 26th day of September, 1977.

James C. Carruth
Judge of the Superior Court

FILED MAR 7 1002 AM '79
James Corbett, Clerk of the Court
By S. Thorne, Deputy

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S.L. Schorr
John F. Battaile III
Attorneys for Plaintiffs

In the Superior Court of the State of Arizona in and for the County of Pima

No. 162419

Grant C. Davis and William H. Davis, as Trustees; The Arizona Bank, as Trustee; and Stewart Title and Trust, as Trustee, under Trust Nos. 1094 and 1148

Plaintiffs

v.

Pima County, Arizona, a body politic; Joseph Castillo, E.S. "Bud" Walker, Ron Asta, Sam Lena and Conrad Joyner, duly elected Supervisors in and for Pima County, Arizona; Glen Knutson, Pima County Zoning Inspector; Trini Goebel, Cyrus Cook, George Hendy, Stanley Krzyzanowski and Charles Camp members of the Pima County Board of Adjustment No. 3

Defendants

Amended Judgment

This action came on regularly for trial before the Court, Honorable James C. Carruth, sitting without a jury, on

June 21, 1977. S. L. Schorr and John F. Battaile III of Schorr & Leonard, P.C. appeared as attorneys for the plaintiffs. Albin Krietz, Deputy County Attorney, appeared for the defendants.

Each of the parties having presented testimony and other evidence; each of the parties having presented Memoranda and Proposed Findings of Fact and Conclusion of Law to the Court; the Court having taken the matter under advisement, heard oral argument and considered said Memoranda and Proposed Findings of Facts and Conclusions.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants' present zoning ordinance and practice as applied to Lots 1-285, Camino de Manana Estates, a subdivision of Pima County, Arizona, recorded in Book 27 of Maps at 77, 78 and 79 are unconstitutional, illegal and void.

2. Plaintiffs have a clear legal right to develop and use Lots 1-285, Camino de Manana Estates, a subdivision of Pima County, Arizona, recorded in Book 27 of Maps at 77, 78 and 79, pursuant to the provision of Articles 7 and 9, Pima County Zoning Plan, as though an ordinance had been adopted rezoning the property to SH and CR-1. Plaintiffs have a clear legal right to receive building and all other permits necessary to develop and beneficially use the subject property in accordance with Articles 7 and 9, County Zoning Plan.

3. Plaintiffs may apply to this Court for such other and further relief as may become necessary to carry out the provisions of this Judgment.

DONE IN OPEN COURT this 26th day of February, 1979.

JAMES C. CARRUTH
James C. Carruth
Judge, Superior Court

Appendix D

Fifth and Fourteenth Amendments to the United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years

of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or confort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.